

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>GARLAND RAY GREGORY JR.,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>DANIEL SULLIVAN, WARDEN, STATE PENITENTIARY; AND JASON RAVNSBORG, ATTORNEY GENERAL FOR THE STATE OF SOUTH DAKOTA,</p> <p style="text-align: center;">Respondents.</p>	<p>CIV. 84-5133-JLV</p> <p>ORDER</p>
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Petitioner Garland Ray Gregory, Jr., an inmate at the Mike Durfee State Prison in Springfield, South Dakota, appearing *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.¹ (Docket 1). Pursuant to a standing order of April 1, 2018, the matter was referred to United States Magistrate Judge Daneta Wollmann pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge issued a report recommending the court dismiss the § 2254

¹Mr. Gregory captioned his pleading as a motion for relief pursuant to Fed. R. Civ. P. 60(b). (Docket 4). United States Magistrate Judge Daneta Wollmann recognized petitioner's claim for relief "must be interpreted as a petition for relief under 28 U.S.C. § 2254." (Docket 9 at p. 1 n.1) (Curry v. United States, 507 F. 3d 603, 604 (7th Cir. 2007)). The court agrees with the magistrate judge's characterization of Mr. Gregory's submission. See Huntimer v. Young, 4:19-CV-04125, 2019 WL 4934860, at *3 (D.S.D. Aug. 27, 2019) (citing Curry, 507 F. 3d at 604), report and recommendation adopted, 4:19-CV-04125, 2019 WL 4933418 (D.S.D. Oct. 7, 2019); Elliott v. South Dakota Seventh Circuit Court, 5:18-CV-05029, 2018 WL 11247857, at *1 (D.S.D. July 2, 2018) (citing Curry, 507 F. 3d at 604), report and recommendation adopted, CIV. 18-5029, 2018 WL 11247856 (D.S.D. Nov. 6, 2018).

petition without prejudice, “pending permission from the Eighth Circuit Court of Appeals to file a second or successive § 2254 petition.” (Docket 9 at pp. 4-5).

Mr. Gregory timely filed objections to the report and recommendation (“R&R”). (Docket 11). In addition, Mr. Gregory filed a motion to stay this case until his case before the South Dakota Supreme Court is resolved. (Docket 13).

Having reviewed the R&R and Mr. Gregory’s objections, the court finds the objections are legally without merit and that the R&R is an appropriate resolution of Mr. Gregory’s petition. Accordingly, it is

ORDERED that petitioner’s objections (Docket 11) are overruled.

IT IS FURTHER ORDERED that the report and recommendation (Docket 9) is adopted.

IT IS FURTHER ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket 4) is dismissed without prejudice.

IT IS FURTHER ORDERED that petitioner’s motion for stay (Docket 13) is denied as moot.

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 2253(c) and Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the court declines to issue a certificate of appealability. Although the court declines to issue a certificate of appealability, Mr. Gregory may timely seek a certificate of appealability from the United States Court of Appeals for the Eighth Circuit under Fed. R. App. P. 22. See Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts and Fed. R. App. P. 22.

IT IS FURTHER ORDERED that if Mr. Gregory does not attach a copy of the Eighth Circuit order 28 U.S.C. § 2244(b)(3)(A) authorizing the district court to consider any second or successive § 2254 application the Clerk of Court shall open a new case, immediately close the case and return all documentation to Mr. Gregory together with a copy of this order.

Dated March 2, 2022.

BY THE COURT:

/s/ *Jeffrey L. Viken*

JEFFREY L. VIKEN
UNITED STATES DISTRICT JUDGE